Supreme Court, U.S.
FILED
JAN 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 86-700

In The Supreme Court of the United States

OCTOBER TERM 1986

JOHN D. VODILA,

Petitioner,

-vs-

RODERICK CLELLAND, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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REASON FOR DENYING THE WRIT

No Conflict Exists Between The Decision Of The Sixth Circuit And Those Of The Ninth And Tenth Circuits.

Chastising the Sixth Circuit for failing to explicitly consider the *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971) retroactivity criteria, Petitioner argues that the decision below conflicts with those of *Gibson v. United States,* 781 F. 2d 1334 (9th Cir. 1986) and *Jackson v. City of Bloomfield,* 731 F. 2d 652 (10th Cir. 1984). Although the Sixth Circuit did apply *Wilson v. Garcia,* ____ U.S. ____, 85 L. Ed. 2d 254 (1985) retroactively, while the Ninth and Tenth Circuits did not, the conflict which Petitioner emplores this Court to expend its considerable and valuable time to resolve, and upon which he premises his entire case, is superficial. The reasoning employed by the Ninth and Tenth Circuits, like that employed by the Third and Eighth Circuits, produces the same result reached by the Sixth Circuit—dismissal of Petitioner's liberty interest due process claim.

In *Jackson,* the Tenth Circuit declined to apply Garcia retroactively to defeat the plaintiffs' claims that they were discharged in retaliation for the exercise of their First Amendment rights. Plaintiffs filed suit under §1983 more than three years but less than four years after their dismissals. At that time, there existed two decisions of the Circuit that justified plaintiffs' delay in filing suit. In *Hansbury v. Bd. of Regents of the University of California,* 596 F. 2d 944 (10th Cir. 1979), the court approved the New Mexico four year statute of limitations for claims of unconstitutional employment discrimination under §1983. *Jackson,* 731 F. 2d at 655. Additionally, in *Shah v. Halliburton,* 627 F. 2d 1055 (10th Cir. 1980), the court declared that where the claim could be characterized in more than one fashion, the longer statute of limitations applied. 731 F. 2d at 654. Thus, held the *Jackson* court, it would be unfair to apply the three year personal injury statute, mandated by the *Garcia* decisions, retroactively. *Id.* at 655.

Similarly, in *Gibson v. United States,* the Ninth Circuit declined to apply *Garcia* retroactively because it had, for nearly a quarter of a century prior to *Garcia,* affirmatively declared a longer period of limitations for all §1983 claims. 781 F. 2d at 1338-39.

It was the absence of such clear precedent that caused the Third and the Eighth Circuits to apply *Garcia* retroactively. First, in *Smith v. City of Pittsburgh,* 764 F. 2d 188 (3rd Cir. 1985), *cert. denied,* 106 S. Ct. 1230 (1986), and later, in *Fitzgerald v. Larson,* 769 F. 2d 160 (3rd Cir. 1986), the Third Circuit held that the absence of a decision on the applicable statute of limitations, coupled with the division amongst the district courts in its circuit, precluded the initial *Chevron* factor from being met. *Smith,* 764 F. 2d at 195; *Fitzgerald,* 769 F. 2d at 163. Similarly, in *Wycoff v. Menke,* 773 F. 2d 983 (8th Cir. 1985), the absence of a "definitive standard" adopted by the court led it to reject Wycoff's argument that he could reasonably have delayed filing his procedural due process claim from November 1977, when it fully matured, until December 1981. *Id.* at 986-87.

Thus, while reaching different results, all of the circuits that have expressly applied the *Chevron* criteria have done so in a consistent fashion. Application of that criteria in like fashion to the case at bar would not yield a different outcome.

Petitioner asserts that a six year statute of limitations was the "settled rule of law" at the time he initiated the action at bar. A careful review of Sixth Circuit law reveals the rule to be unsettled, at best.

In *Mason v. Owens-Illinois,* 517 F. 2d 520 (6th Cir. 1975), the Sixth Circuit held that the applicable statute of limitations for a §1981 action in Ohio was Ohio Rev. Code §2305.07, which provides for a six year period. While doing so, the court reaffirmed the then longstanding rule that the statute of limitations is that "which would be applicable in the most closely analogous state action." *Id.* at 521.

Relying upon *Mason,* the Sixth Circuit in 1977 twice rejected the application of Ohio Rev. Code §2305.07's six year period to §1983 actions concerning an improper arrest and perjured testimony. *See Carmicle v. Weddle,* 555 F. 2d 554 (6th Cir. 1977) and *Austin v. Brammer,* 555 F. 2d 142 (6th Cir. 1977).

Similarly, in 1979, the Circuit held that Michigan's shorter three year period for personal injuries, rather than its six year catch-all period applied to actions under §1983. *Geromette v. Gen. Motors Corp.,* 609 F. 2d 1200 (6th Cir. 1979); *An-ti Chai v. Mich. Tech. University,* 493 F. Supp. 1137 (W.D. Mich. 1980).

In addition to *An-ti Chai,* a case which upon Petitioner relied in his brief on the merits in the Sixth Circuit, another district court in the Sixth Circuit adopted a shorter statute for §1983 liberty interest due process claims. In *Hines v. Board of Educ. of Covington, Ky.,* 492 F. Supp. 469 (E.D. Ky. 1980), *aff'd.,* 667 F. 2d 564 (6th Cir. 1982), the District Court held that Kentucky's one year statute for slander applied to the claim that plaintiff's due process rights had been violated when she was fired without a hearing, after being accused of involvement in illicit sex and illegal drugs. The district court, after a review of *Mason, Austin,* and *Weddle,* rejected plaintiff's argument that the provisions of Kentucky Rev. Stat. §413.120(2) setting five years as the limitations period for "an action upon a liability created by a statute" applied.

Despite the absence prior to 1982 of any definitive Sixth Circuit standard for limitations in "name clearing" liberty interest due process claims, Petitioner did not file suit within the one year period for libel and/or slander under Ohio Rev. Code §2305.11. Nor did he file suit within the two year period for personal injury under Ohio Rev. Code §2305.10. Instead, he waited nearly three years to commence this action. Justification, he asserts, for the delay flows from the district court cases of *Campbell v. Sirak,* 476 F. Supp. 21 (S.D. Ohio 1976) and *Schorle v. City of Greenhills,* 524 F. Supp. 821 (S.D. Ohio 1981). Neither of them, however, represents clear precedent for Petitioner's actions.

In *Campbell*, the district court, without discussion and prior to the Sixth Circuit's decisions in *Austin* and *Weddle*, adopted Ohio Rev. Code §2305.07's six year period of limitations in an action involving the discharge of an employee in retaliation for the exercise of her First Amendment rights. Even assuming that the court's adoption of §2305.07 is clearly established precedent, it relates not to a claim where defamatory statements were made about someone who was fired, but rather to the firing of someone who made non-defamatory statements. Thus, Campbell's claim was different in kind from that of Petitioner.

The district court's decision in *Schorle* is likewise of questionable value to Petitioner's argument. *Schorle* was a false arrest action, not a name-clearing, liberty interest action. Furthermore, *Schorle*, itself, represents a break from the Sixth Circuit decisions in *Austin* and *Weddle*.

Thus, had the panel below expressly considered the *Chevron* criteria, it is unlikely that it would have declined to apply *Garcia* retroactively. And, even if the panel might have reached a contrary result, the issue is not unique or of such moment as to warrant review by this Court.

CONCLUSION

WHEREFORE, there being no conflict amongst the circuits or request to alter the longstanding *Chevron* criteria, Respondents urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was mailed via ordinary U.S. Mail to Jay F. McKirahan, Attorney for Petitioner, 3040 Riverside Drive, Suite 103, Columbus, Ohio 43221, on this _____ day of January, 1987.

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